In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-239

HARRIOTT H. CHILDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted (Pet. App. B) in the United States District Court for the Eastern District of Virginia for knowingly possessing 40 pounds of marihuana with intent to distribute it, in violation of the Assimilative Crimes Act, 18 U.S.C. 13, incorporating Section 54-524.101(a) of the Code of Virginia.[1] She was found guilty after a jury trial and was sentenced to three years' imprisonment, all but six months of which was suspended. The court of appeals affirmed (Pet. App. A).

Petitioner contends that her conviction for possessing a controlled drug with intent to distribute it was

[1] The offense took place within the special territorial jurisdiction of the United States (Washington National Airport).

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unconstitutional because the Virginia Code provision defining her offense stated that a finding of intent to distribute "may be based solely upon evidence as to the quantity" of the substance possessed and she argues that this language creates an unconstitutionally vague and irrational presumption. The argument is not well founded. The quoted language, which has since been repealed by the Virginia legislature, did not purport to establish a presumption of guilt based on quantity, but merely authorized an inference of intent if the jury chose to draw it. The provision did nothing more than state the obvious—that intent to distribute may sometimes be inferred solely from the amount of a drug found in the person's possession.[2]

In any event, the trial judge here instructed that intent should be determined from all the evidence in the case, including, but not limited to, the large amount of marihuana (16 bricks) in petitioner's trunk.[3] As the court of appeals pointed out, the trial judge did not limit his charge to the challenged pro-

[2] *United States* v. *Manarite*, 448 F. 2d 583, 594 (C.A. 2), certiorari denied, 404 U.S. 947, for example, sustained the validity, as applied, of a similar provision in 18 U.S.C. 1465. We note also that the federal courts have uniformly upheld the rationality of an inference of intent to distribute from the quantity of the item possessed. *E.g.*, *United States* v. *Ortiz*, 445 F. 2d 1100, 1104–1105 (C.A. 10), certiorari denied, 404 U.S. 993, dealing with former 21 U.S.C. 331(q)(3), punishing possession of depressant or stimulant drugs with intent to distribute. As that opinion points out, the legislative history of that statute plainly showed that Congress meant to allow intent to dispose of a drug to be proved from the quantity possessed.

[3] In addition to the quantity of the drug possessed by petitioner there was other evidence in the case from which the jury was entitled to infer that she intended to distribute the drug

vision, but instead "employed the standard of proof of intent normally to be applied in the absence of any statutorily authorized inference" (Pet. App. A 6). The court below therefore properly found it unnecessary to pass upon the constitutionality of the now repealed statutory provision.

In *Leary* v. *United States*, 395 U.S. 6, 51, this Court noted that a brick of marihuana of this size will furnish approximately 3,300 marihuana cigarettes. Sixteen bricks would be enough for approximately 52,800 such cigarettes. Thus, although the petition rhetorically wonders (Pet. 7–8) whether "possession of two 'joints' of marihuana" would constitute a sufficient quantity to justify a rational inference of intent to distribute, this is hardly the case in which to pursue that inquiry. One whose conduct is clearly and validly covered by a statute is in no position to urge that it might not be properly applicable to someone else under dramatically different circumstances. *United States* v. *Rames*, 362 U.S. 17, 21.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

(Pet. App. A 5): "The circumstances in this case, including the quantity, method of packaging, false name of addressee, and other facts, were more than sufficient to justify the submission of the issue of intent to distribute to the jury. People do not normally order a thirty-pound trunk load of marihuana for personal use, especially when packaged as this shipment was."

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